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IN THE

Supreme Court of the United States

October Term, 1961

No. 881

EXPOSITION PRESS, INC., and EDWARD UHLAN,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JULES R. TEITLER,
PAUL H. TEITLER,
66 Court Street,
Brooklyn 1, New York,
Counsel for Petitioners.

JULES R. TEITLER,
of Counsel.

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The Petition of Exposition Press, Inc., and Edward Uhlan, individually and as an officer of Exposition prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit (Appdx. B, *infra*, p. 33) entered in the above entitled case on the 28th day of November, 1961.

Opinions Below

The opinion of the Federal Trade Commission is printed in the Record (Pet. Appdx. pp. 12a to 18a).

The opinion of the United States Court of Appeals for the Second Circuit is reported in 295 F. 2d 869 (Appdx. A, *infra*, p. 17).

Jurisdiction

The decree of the United States Court of Appeals for the Second Circuit was entered on the 28th day of November, 1961. Jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1)(c), Title 15 U. S. C. 45(a)(1).

Petitioners' time was extended by the Honorable Justice John M. Harlan, to April 20, 1962, by an order dated February 17, 1962.

Questions Presented

1. Is the evidence of representations made by the appellants, contained in an ad less than 1¼ inches long and 2¼ inches wide, so overwhelming and likely to mislead and is it so deceptive as to be detrimental to the "public interest"?

2. Has the remedy selected a reasonable relation to the unlawful practices found to exist?

3. Is the Commission's cease and desist order prohibiting the use of the term "Royalties or *in any other manner* make payments to an author based on the sales of the author's book", clear and unambiguous as to be enforceable or is it so conjectural and burdensome as to make compliance impracticable?

4. Is the term Royalties to be limited in scope and meaning contra to accepted usage in the publishing trade and by the American lexicographers?

5. Has the Commission acted discriminatory by compelling compliance against Petitioners without enforcing similar compliance against other competitive subsidy publishers?

6. Did the Commission err in disallowing the defense of *res judicata*?

Statute Involved

The statute involved in this case is generally known as the Federal Trade Commission Act, in particular:

Section 5(a)(1). "Unfair method of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful". 15 U. S. C. 45(a)(1), 66 Stat. 632 (1952).

Section 5(a)(6). "The commission is hereby empowered and directed to prevent persons or partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce". 15 U. S. C. 45(a)(6), 66 Stat. 632 (1952).

STATEMENT

The Facts Material to This Case

The complaint.

On May 15, 1959, the Federal Trade Commission issued a complaint against the petitioners, engaged in the Subsidy Publishing of books for over 25 years (Pet. Appdx. 19a) charging them with violating the Federal Trade Act by using the term "Royalties" in their business operation, as being deceptive (Pet. Appdx. 4a). In support of its complaint, particular reference is made by the Commission to an ad which Exposition published about 1¼" long by 2¼" wide which reads as follows (X. 1, Pet. Appdx. 31a, 32a).

> Free to WRITERS
> seeking a book publisher
>
> Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion. Free editorial appraisal. Write Dept. STM-3 Exposition Press, 386 4th Ave., N. Y. 16.

In response to such inquiry invariably, Exposition would then forward two brochures, one entitled "You can Publish Your Book" (X6) and the other "What Every Writer Should Know About Publishing His Own Books" (X7, Pet. Appdx. 94a, 71a).

In substance the Author is first urged through this medium to try to have his books published by trade publishers (without any subsidy), if he can't, he can achieve publication on a "subsidy" basis, that is, the author pays a specified sum to the publisher and receives a royalty of 40% of the retail sales price of the book. These brochures disclosed the high cost of the publisher's operation, the hazards involved, the unpredictability of sales and the prospect that the Author may not realize his subsidy expenditure (Pet. Appdx. 24a, 25a, 26a).

Should the author's manuscript be accepted, Exposition then sends him a written contract (X5, 12. Pet. Appdx. 95a, 26a). Paragraph 4 of such contract provides among other things that Exposition will pay the Author in addition to other payments, royalties of *40% of the retail sales price* of all books sold and paragraph 26 specifically fixes the amount of the subsidy the author pays in three installments (Pet. Appdx. 26a).

The answer.

Exposition Press, Inc. in its answer denies the material allegations of the complaint and pleads affirmatively the defense of *res judicata*.

The hearing Examiner filed his initial decision overruling this defense and sustained the allegations of the complaint, ordering Exposition to cease and desist from using the term "Royalty" until the subsidy is repaid (Pet. Appdx. 36a). We find nothing in the record to sustain any complaint against Edward Uhlan individually.

The Petitioners entered an appeal to the Commission, which in turn by its separate opinion substituted its own findings, ordering Exposition to cease and desist from representing "through the use of the term 'Royalties' *or in any other manner* that they will make payments to an author based on the sale of the author's book until a disclosure is made *in immediate conjunction therewith* that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the Author".

We are confused by the Commission's order vacating the "*initial decision*" (Pet. Appdx. 18a). Has it reference to Docket No. 6638 referred to in the previous paragraph? If so the Commission appears to have indirectly recognized the import of the prior proceedings.

The evidence relied on by the Commission was given by ten authors that dealt with Exposition, six of whom had begun their dealings *before* the ad, now objectionable, was published, and four of whom had answered the ad and only one would have interpreted it as not calling for any payment by him. *However, none testified that they were dissatisfied* (Appdx. A *infra*, p. 27).

Based upon this slender evidence supplied by these ten authors coupled with the ambivalent testimony of five professional "trade" publishers and two professional authors, the Commission proceeded to amass a record of over 1100 pages and exhibits, formidable in size if not in content, and sustained the theory that the ad was misleading even though later brochures received by authors specifically left not the slightest doubt that the author must pay Exposition a subsidy in three installments for the publication of the first edition of his book with additional royalty payment of the retainer sales prices of all books sold.

The sole issues in this case are:

a) Is the mentioned ad so palpably false and deceptive as to constitute a violation of the law (F. T. C. Act)?

b) Is a proceeding by the Commission warranted thereunder in the order of priority of *public importance* intended by Congress?

c) Is this evidence so substantial as to support the Commission's conclusion?

Reasons for Granting the Writ

The majority of the United States Court of Appeals affirmed the order of the Commission on November 6, 1961. However, Honorable Judge Henry J. Friendly, a recognized jurist of great ability and learning, dissented from the majority opinion and voted in a vigorous, lengthy opinion to annul the Commission's order. His opinion speaks more eloquently than any argument we propose (see Appdx. A *infra*, pp. 25 to 32).

It is almost beyond imagination and possible belief that a small ad produced by the Commission (X1. Pet. Appdx. 31a, 32a) has created so much deception and havoc in the subsidy publishing business and is of so great priority of public interest as to cause the Commission to take an abundance of testimony and exhibits, the time and effort of all parties concerned, which might have been used to better stead in greater public endeavor.

Reviewing the Act's legislative history in his classic study "The Federal Trade Commission" (1924), Gerard C. Henderson observed that one of the reasons why Congress adopted the "anomalous procedure" which makes the Commission "both complainant and Judge" was that "the Legislators feared that the Commission would be overwhelmed with a host of petty squabbles, and therefore

provided that the formal machinery of the Commission could be set in motion only by the Commission itself, where the case seemed to be of sufficient importance" (pp. 328-29).

Throughout its history, from its earliest days to the present, the Commission has been charged with failing to fulfill this responsibility imposed on it by Congress. Surveying its docket almost forty years ago, Henderson found:

> "That the Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases * * * involving trivial or merely *technical* offenses, *in which the public interest is not always easy to discern.* There is constant complaint of the crowded condition of the Commission's docket. It takes months to bring a case to a hearing, and additional months to reach a decision." (p. 337).

When the Task Force of the Hoover Commission made its study in 1949, it found that time had only aggravated the conditions described by Henderson in 1924:

> "As the years have progressed, the Commission has become immersed in a multitude of petty problems * * *. The Commission has largely become a passive judicial agency, waiting for cases to come up on the docket, under routinized procedures, without active responsibility for achieving statutory objectives."
> "*In the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance.*" (pp. 125, 128)

It is common knowledge that the Commission is still beset by this problem. Its resources of manpower, money, and time are necessarily limited. The basis of selection of cases in which complaints are to be issued is thus a prime

importance in determining how well the Commission does its job. Here, too, there operated a kind of Gresham's Law. The trivial and inconsequential cases leave little room for, and tend to drive out, the substanital and significant (cited in *F. T. C.* v. *Gimbel Bros.*, Docket No. 7888, pp. 3, 4, opinion of Commissioner Elman). We vehemently urge these strictures to be applicable to our case.

ARGUMENT

I—The Testimony.

The testimony adduced before the hearing examiner is so slender that after reading it one must readily conclude that the very foundation of the Commission's contention has been shattered like an impetuous torrent that had undermined its banks and bore down all before it. The gravamen of the complaint in paragraphs 4, 5 and 6 (Pet. Appdx. 4a) allege that Exposition represents that it pays its authors a royalty of 40% on books sold by it (Par. 4). That this representation is false because the author subsidizes the entire costs of publication and that therefore petitioners do not pay any kind of royalty (Par. 5).

Actually the Commissions major theory appears untrue since a subsidy does not cover the entire costs of publication plus a profit to Exposition. A subsidy covers only about 75% of the cost of publication (Pet. Appdx. 38a-72a). Obviously the complaint does not state a cause of action.

The Commission should assume a wider responsibility than that undertaken by a private litigant. It needs concrete bases, a thorough investigation to the facts and a full presentation of evidence against a respondent and not merely a *prima facie* case (*Nisrok* v. *F. T. C.*, 278 F. 2d 337, 4th Cir. 1950).

II—The Meaning of the Term Royalty.

A royalty is said to be a payment by a publisher to an author of a percentage of the retail or wholesale price of books sold. The Oxford English Dictionary defines royalty as "* * * a payment made to an author * * * for each copy of a book * * * sold by the publisher". The term royalty has by long usage been woven into fabric of our language. Its meaning as above defined, is clear and unambiguous. Since when has good common sense and simple reasoning become a substitute before the Commission, for speculative and conjectural conclusions as to the meaning and import of a word, descriptive, recognized and approved in meaning by our American lexicographers. In *S. Buchsbaum & Co. v. F. T. C.* (160 Fed. 2d 121), the Court said "We find nothing in the act which discloses any intention on the part of Congress to prevent any citizen from selling and transporting in interstate commerce any article, useful and beneficial to the public, made by him under a descriptive name as recognized and approved by our American lexicographers since the birth of our nation, or which at this time is recognized and approved by them. * * * "

The Commission's argument that if an author pays a publisher a sum of money to induce him to embark on a hazardous and costly enterprise of *publishing* a book (which includes printing, promotion, selling and distributing the book) *therefore any payment to the author* is not a royalty, is not a logical or legal proposition. The Commission's contention is utterly without precedent and unsound and clearly presents an unprecedented question for review by this Court.

III—Cases Cited Are Not Identical.

The Commission argues that the ad heretofore referred to "falls squarely within the principle enunciated by the Court in the *Carter* case" (186 F. 2d 821 (7 Cir. 1951)), that

the law is violated if the first contact or interview is secured by deception even though the true facts are made known to the *buyer* before he enters the contract of purchase. (*F. T. C.* v. *Standard Educational Society et al.* (302 U. S. 112, 116) and *Progress Tailoring Co. et al.* v. *F. T. C.* (153 F. 2d 103 (7 Cir., 1951). Facts cannot be tortured or twisted into doubts by presenting biased comparisons with other cases which must be confined to their own findings and circumstances. In this case there is no initial misstatement only the brochures make the representations; *the ad, apart from the brochures does not*, except that Exposition will send the brochure free, which it does.

In the *Cater* case, *supra*, cited by the Commission the ad said that Arrid "stops perspiration 1 to 3 days", but, after the purchase the buyer found that the inscription on the jar said "use daily for constant protection".

Similarly in *Standard Education Society* (*supra*) the initial representation was that an encyclopedia would be given "free" whereas in truth it was *not*. In the *Progress Tailoring Co.* (*supra*) the ad said that the firm would give suits of clothes "free" to salesmen, later disclosures proved, that they would have to pay for them by their services. Thus in each *of these cases there was an attempt to sell a product by a specific representation which was found to be deceptive.*

It is respectfully submitted that the Court should be wary of an attempt to emasculate the truth by any process of specious reasoning based on selective probabilities and biased comparisons, calculated to confuse rather than aid on reaching the true facts in this case. By the widest stretch of imagination one cannot associate the facts here with the cases cited by the Commission.

A basic error of the Commission, we submit, is that it construes the statement "get 40% royalties" as representing that the author will receive a "*net return*" on their books. But the ad is incapable of that construction. It

does not use the word "net return"; there is nothing inherent in the concept of "royalties" which necessarily means a net return or excludes the existence of a subsidy. A royalty is a royalty subsidy or no subsidy. Most of all, the *brochures* explicitly informs the author "how to get * * * 40% royalties!"

IV—The Witnesses Called.

In support of the Commission's case five professional publishers Mr. McCallum of Harcourt, Brace; Mr. Turk of Simon & Schuster; Mr. Harper of Random House; Mr. Kelly of Grossett and Dunlop and Mr. Schiefflen of Scribners were called to testify in its behalf *but not a single subsidy or vanity publisher was called.* Why? Can it be, that these professional Trade Publishers have a personal interest in the prosecution and result of this case? Is it possible that these professional trade publishers were interested in eliminating subsidy publishers, to have the entire field to themselves? After all if the competitors of Exposition, engaged in subsidy publishing, allegedly suffered injury by Exposition deceptive practices, as the Commission claims, shouldn't they have been called? Obviously they were not called because injury to Exposition's competitors could not be proved. We doubt the sincerity of the Commission in this regard. It was an attempt to change the true complexion of the petitioners' business by testimony of professional witnesses and authors whose testimony could only be favorable to the Commission.

There is no record, and we have heard of none, that similar enforcement action was taken by the Commission against other subsidy publishers doing the very same thing. Petitioners feel they have been discriminated against, wrongfully, as the only object of the Commission's wrath.

We see an analogy between our case and the case of *Federal Trade Commission* v. *Raladam Co.* (283 U. S. 652),

where Justice Sutherland speaking for the Court stated: "Findings of the Commission justify the conclusion that the advertisement would tend to increase the business of respondent; but there is neither *findings* nor *evidence* from which the conclusion legitimately can be drawn that these advertisements substantially injured or tended thus to injure the business of any competitor or of competitors generally, whether legitimate or not. *None of the supposed competitors appeared or was called upon to show, what if any, effect the misleading advertisements had, or were likely to have upon his business*".

However all witnesses are in agreement that:

a) That the professional or trade publishers hesitate to publish books of poetry, plays, sermons and religious books and of necessity these *must* fall into the hands of subsidy publishers (Pet. Appdx. 69a-70a).

b) Authors generally seek a subsidy publisher when they cannot place their books with trade publishers and in most cases the authors know that theirs is not a commercial venture and will not sell or pay and they have no hope of getting their money back yet they insist on publishing their books to gain prestige at times, promotions in their jobs and increases in salaries, etc. (Pet. Appdx. 56a, 57a, 58a).

c) That Exposition has a good reputation in the trade (Pet. Appdx. 61a).

d) That royalty is defined as a percentage of the retail or wholesale price and it has the same meaning in the publishing field as in every day common speech and that the rate of percentage paid and the amount of the money received by the author, whether equal to or less than the subsidy, all have no bearing on the legitimate use of the term royalty, to describe the percentage paid to the author and such percentage payments are never called anything except a royalty (Pet. Appdx. 51a, 52a, 55a). These facts show that "royalty" is a "royalty" and that the initial unascertainable fact of the quantum of sales and royalties

is wholly irrelevant. It is also significant that not a single author testified that he was induced to execute Exposition's contract by reason of the ad nor could he, for it is beyond dispute, before any contract was signed the prospective author had already received the ad, and the brochures, which fully explained Exposition's subsidy plan. The contracts were signed on the bases of the brochures and not the ad. Therefore, paragraph 6 of the complaint is completely disproved.

Res Judicata

In September, 1956, the Federal Trade Commission issued its complaint against the same Petitioners under Docket No. 6638 (CCH Trade Regulation Reporter 1956-1957 paragraph 26, 220), wherein Petitioners were charged with a number of violations. Over 1100 pages of testimony were then taken, together with many exhibits. Rather than prolong costly proceedings, Petitioners in 1957 consented to an order to desist from 25 trade practices, but the statement that Exposition pays a 40% royalty was not one of those enumerated in the desist order and this and all other charges were dismissed (Pet. appdx. 30a). One of the brochures submitted for approval to the Federal Trade Commission at that time in petitioner's compliance report of 1956 was "You Can Publish Your Book" which was approved (Pet. Appdx. 96a). Three authors, witnesses for the Commission in the instant complaint, testified that they had begun dealing with Exposition as a result of *similar ads published in 1954, 1955 and 1957* (Pet. Appdx. 45a, 77a, 94a).

We respectfully urge that the defense of *res judicata* is applicable to proceedings before the Federal Trade Commission (*Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620) and to final orders entered on consent. In 2 American Law Reports (2nd) at page 521, the rule is thus stated.

> "As a general proposition, it is well settled that a valid judgment or decree entered by agreement or

> consent, operates as *res judicata* to the same extent as a judgment or decree rendered after answer and contest * * *."

Res judicata applies not only to issues which were previously specifically raised but also to those which could or should have been raised (*Cromwell* v. *County of Sack*, 93 U. S. 351; 352).

The law requires a party to "try * * * his whole case at one time; he must present 'all the grounds upon which he expects a judgment in his favor.'" (*Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 320.)

In our opinion this evidence submitted constitutes a weather-vane that indicates the true nature and destiny of Petitioner's defense, and that weather-vane points overwhelmingly that the defense of *res adjudicata* is applicable. Were it not so, by bringing repeated proceedings of a similar nature a small business can be ruined.

The Meaning of the Federal Trade Commission Order

The Commission's order prohibits the use of the term "Royalty" or *in any other manner* that they will make payments to an author based on the sale of the Author's book, unless disclosures are made etc. (Pet. Appdx. 11a) and it has also inferred that its order prohibits the use of terms "net return", "payment", "profit", "costs", "fair return", "reasonable profit". We believe that the order goes too far and many complex problems arise in its interpretation and enforcement. The term "publishing", accepted in the trade, literally includes the costs of printing; promotion, selling and distributing a book (Winston and Oxford Dictionaries) and the words "in immediate conjunction therewith" are superfluous. There appears therefore much confusion in the mind of the Petitioner and the subsidy publishing trade.

Surely the Court has the power to modify the Commission's order for clarification (*American Chain & Cable Co.*

v. *F. T. C.* 142 F. 2d 909 (4th Cir. 1944), *Carter Products Inc.* v. *F. T. C.* 186 F 2d 821 (7th Cir. 1951). In *Siegel Co.* v. *F. T. C.* (327 U. S. 608) Justice Douglas said "We find no indication that the Commission considered the possibility of such accommodation (the saving of a trade name) * * * but we are left in the dark whether some change of names short of excision would in the judgment of the Commission be adequate". The Commission's order was reversed for clarification and modification. In our own case, all are agreed that if an alternative remedy had been suggested, it might have been considered (majority opinion, Appdx. A. 24 (3).

CONCLUSION

The important unprecedented issues involved here, the improper and uncertain interpretation and proposed enforcement of the Federal Trade Commission's order, the impact it has on the subsidy publishers and the insignificance of the prosecution as a "public interest" in general, presents a compelling case for review by this Court, as well as to correct the incorrect decision below. For these reasons, petitioners respectfully pray that a Writ of Certiorari issue to review the decree of the Court below.

Respectfully submitted,

JULES R. TETTLER,
PAUL H. TETTLER,
66 Court Street,
Brooklyn 1, New York,
Counsel for Petitioners.

JULES R. TETTLER,
of Counsel.

Dated: April 16, 1962.

APPENDIX A

Opinion of United State Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—September Term, 1961.

(Argued September 29, 1961 Decided November 6, 1961.)

Docket No. 26840

EXPOSITION PRESS, INC. and EDWARD UHLAN,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondents.

Before:

LUMBARD, *Chief Judge*

FRIENDLY and SMITH, *Circuit Judges.*

Petition for review of an order of the Federal Trade Commission requiring petitioners, pursuant to Federal Trade Commission Act § 5, 15 U. S. C. § 45, to cease and desist from deceptive advertising practices.

Petition denied; order affirmed and enforced.

Appendix A—Opinion of United States Court of Appeals for the Second Circuit

PHILIP ADLER, New York, N. Y., for petitioners. CHARLES C. MOORE, JR., Federal Trade Commission, Washington, D. C. (James McI. Henderson, General Counsel, Alan B. Hobbes, Assistant General Counsel, and Jno. W. Carter, Jr., Federal Trade Commission, Washington, D. C., on the brief), *for respondents.*

LUMBARD, *Chief Judge:*

Exposition Press, Inc. and Edward Uhlan, its president, petition for review of an order directing them to cease and desist from certain deceptive advertising practices entered by the Federal Trade Commission pursuant to § 5 of the Federal Trade Commission Act, 15 U. S. C. 45.[1]

Petitioners attack the order on a number of grounds: that the complaint before the Federal Trade Commission did not state a cause of action, that the Commission's findings of deceptiveness are erroneous; that on principles of *res judicata* the Commission's proceedings were barred by an earlier consent order, and that in any event the Commission's order is too broad and should be modified. We find these contentions to be without merit.

Exposition Press, Inc. is a "subsidy" or "vanity" publisher. Its business differs from that of most publishing houses in that normally most or all of the expense of publishing its books is paid in advance by their authors. Less

[1] "Unfair methods of competition in commerce, and unfair deceptive acts or practices in commerce, are hereby declared unlawful." 66 Stat. 632 (1952), 15 U. S. C. § 45(a)(1) (1958).

than 10% of its authors recoup their investments and derive actual profit from their writing.

The Commission's complaint attacked Exposition's use of the following advertisement, which was inserted in a variety of newspapers and magazines:

> "Free to Writers
>
> seeking a book publisher
>
> Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion. Free editorial appraisal. Write Dept. STM-3.
>
> Exposition Press, 386 4th Ave., N. Y. 16"

The hearing examiner found that the application of the term "royalty" to any payments from sales receipts made to an author before his entire investment had been returned was deceptive *per se*.

The Commission vacated the Examiner's findings and made more limited findings to the effect that the advertisement as worded tended to "mislead and deceive a substantial portion of the purchasing public with respect to the payment they will receive for the publication of their books. . . ." It entered an order that petitioners cease and desist from:

> "Representing through the use of the term 'royalties' or in any other manner that they will make

---

Of the authors published by Exposition, Dr. Cleric, for example, advanced $2,100 for publication of his book "Hello, Hello, Hello Doc" and received back $242 in "royalties." Mrs. Rovalli, for her "Andrew Johnson, Presidential Scapegoat," paid Exposition $2,000 and got $230 back. Miss Clavier, for her "The God-Guided Life," paid $1,150 and got $53 back.

> payments to an author based on sales of the author's book unless a disclosure is made in immediate conjunction therewith that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and disfributing the book must be paid in whole or in substantial part by the author."

A subsequent motion to modify the order was denied.

1. *Res Judicata*—We agree with the hearing examiner and the Commission that the consent order agreed to between Exposition and the Commission in November 1957 does not bar the present proceeding. Exposition argues that this earlier order, which dismissed "all other charges in the complaint," disposed of the question whether the mode of advertising now attacked was unfair. Its argument is not that the earlier complaint specifically alleged misuse of the term "royalty," but rather that because of a statement by Commission counsel at the earlier hearing that "respondents have dubbed it a royalty when it is only a percentage paid back" the question was put in issue, or in any event should have been.

The advertisement here in question was first used by Exposition only after the completion of the earlier proceeding. There is no indication that prior to the earlier proceeding similar representations have been made to the public at large that Exposition was a regular trade publisher which paid extraordinarily high compensation to its authors. In any event, new violations will support new proceedings dealing with different periods of time, at least where there is no indication of harassment by the Commission. See *FTC v. Raladam Co.*, 316 U. S. 149 (1942); 2 Davis Administrative Law Treatise 570-71 (1958); cf. *Grandview Dairy, Inc. v. Jones*, 157 F. 2d 5 (2 Cir.), cert.

denied, 329 U. S. 787 (1946). Incidental mention in the earlier hearing of misuse of the word "royalty" could not possibly have put in issue the questions raised by this advertisement.

2. *Findings and Conclusion of the Commission*—Considering the record as a whole, see *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), we find substantial support for the Commission's finding that Exposition's advertisement has "the tendency and capacity to deceive a substantial portion of the purchasing public." Great weight must be given by us to the Commission's factual inferences. *Corn Products Ref. Co. v. FTC*, 324 U. S. 726 (1945). Although only one of the author-witnesses testified to having been actually deceived by the advertisement in question, a majority of the Exposition clients who testified said that, although they had begun their dealings with Exposition prior to the use of this advertisement, it would have deceived them but for their present sophistication. Considering this testimony, the dictionary definition of "royalty" as "a duty or compensation paid to the owner of a * * * copyright for the use of it * * *,"[3] and the somewhat ambivalent testimony of publishers as to the technical usage of the word, we find ample reason to believe that the ordinary reader of the advertisement would be misled as to Exposition's terms of publication. Actual consumer testimony is in fact not needed to support an inference of deceptiveness by the Commission. *Charles of the Ritz Distributors Corp. v. FTC*, 143 F. 2d 676, 680 (2 Cir. 1944); cf. *E. F. Drew & Co. v. FTC*, 235 F. 2d 735 (2 Cir. 1956), cert. denied, 352 U. S. 969 (1957). In evaluating the tendency of lan-

[3] Webster's New International Dictionary, 2 Ed. Unabridged (1960). See *Charles of the Ritz Distributing Corp. v. FTC*, 143 F. 2d 676, 679 (2 Cir. 1944).

guage to deceive, the Commission should look not to the most sophisticated readers but rather to the least. *FTC* v. *Standard Educ. Soc'y*, 302 U. S. 112, 116 (1937); *Book-of-the-Month Club, Inc.* v. *FTC*, 202 F. 2d 486 (2 Cir.), cert. dismissed, 346 U. S. 883 (1953). For this reason we must reject the argument that any reasonable author should have known enough not to expect a free-and-clear 40% royalty; the fact that a person has produced a manuscript does not necessarily mean that he has any knowledge of publishers' prevailing rates.

A more serious problem is raised by the argument that, even granting the deceptiveness of the initial advertisement, no cause of action under Section 5 is made out since any prospective customer answering the advertisement was immediately sent literature which made it clear, before any contract was made, that the author was required to subsidize the expenses of publication. Since the Commission's findings are only that the advertisement is deceptive, we must accept this contention that the initial misconception is soon clarified.

Nonetheless, we hold that it is within the Commission's power to prohibit the initial deception. "The law is violated if the first contact * * * is secured by deception * * *, even though the true facts are made known to the buyer before he enters into the contract of purchase." *Carter Prods., Inc.* v. *FTC*, 186 F. 2d 821 (7 Cir. 1951); see *Book-of-the-Month Club, Inc.* v. *FTC*, *supra*; *Progress Tailoring Co.* v. *FTC*, 153 F. 2d 103 (7 Cir. 1946).

In any event, the Commission found that Exposition's competitors were injured by the tendency of the deception to "induce [authors] * * * to enter into correspondence with respondents, leading in many instances to the acceptance of a contract for respondent's services." It is a permissible inference that Exposition by its misleading

initial approach attracted business which it would not otherwise have obtained. In such a situation testimony of actual injury to specific competitors is not required. *FTC* v. *Raladam Co.*, 316 U. S. 149, 152 (1942). Although the Commission did not explicitly marshal evidence of the existence of other subsidy publishers competing with Exposition, the fact that there are such publishers emerges amply from a reading of the record as a whole. Even if these competing publishers did use various unfair methods of their own for attracting business (which the record in this case does not show), this would not excuse Exposition's unfair deception. Cf. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211 (1951).

Although the Federal Trade Commission can act against a deceptive advertiser only if it finds such action be "in the interest of the public," Federal Trade Commission Act § 5(b), 15 U. S. C. § 45(b), and although its finding of public interest is subject to our review, *FTC* v. *Klesner*, 280 U. S. 19 (1929), we think there is sufficient public interest in preventing Exposition's deceptive advertising to justify our enforcement of the Commission's order. This is not, like the *Klesner* case, an instance of Federal Trade Commission intervention in a private dispute. Nor is the deception only as to trivial matters, see *Moretrench Corp.* v. *FTC*, 127 F. 2d 792, 795 (2 Cir. 1942) (dictum). That the deception may be remedied before the customer has suffered any more pecuniary loss than the price of a postage stamp does not foreclose the Commission from acting to proscribe it in the first instance.

Judge Friendly argues with great force that this violation was too trivial and that it is not in the public interest to kill this gnat with Commission dynamite. But it seems to us that once we say that the courts should exercise their judgment as to whether an alleged deception is of sufficient

importance to warrant Commission action, we get into matters which are not entrusted to us and as to which we have little qualification and even less necessary information. For example, we cannot know but what a proceeding such as this might be the means whereby in the long run the Commission may use its influence to prevent continuance of many similar deceptions. It is by such means that laws are enforced and the government is able to bring about a better moral climate in the field of advertising. From the many hundreds of complaints it has before it, surely the Commission is better able to judge whether this proceeding is a step forward in the attainment of a higher morality in the great mass of information and propaganda designed to influence the public.

3. *The Wording of the Cease-and-Desist Order*—Considering the violation, the wording of the Commission's order is unexceptionable. The Commission has wide discretion in framing its order, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946). The violation consisted in representing that the author's share of sales receipts is income to him, free and clear, and no alternative formula has been suggested which would remedy the likelihood of such misrepresentation. To permit the advertisement to state, as Exposition proposes, that authors "get 40% of retail price" would perpetuate the same deception.

The petition to review and set aside the Commission's order is denied. The order will be enforced pursuant to Federal Trade Commission Act § 5(c), 15 U. S. C. § 45(c).

Appendix A—Opinion of United States Court of Appeals for the Second Circuit

FRIENDLY, *Circuit Judge (dissenting)*:

Some people think they have written books for which the world is waiting. Publishers who must back judgment with investment take a less sanguine view. Rejection slips accumulate, and frustration mounts. Petitioners are in the business of relieving it.

In September, 1956, the F. T. C. issued a complaint, Docket 6638, CCH Trade Regulation Reporter, 1956-1957, ¶ 26,220, challenging a number of petitioners' then trade practices, many of them apparently subject to fairly serious criticism. A hearing followed, in which 1000 pages of testimony were taken and more than 200 exhibits filed. Ultimately, the Commission entered a consent order directing petitioners to cease and desist from 25 specified practices and dismissing all other charges in regard to unfair methods of competition and unfair deceptive acts and practices, 54 F. T. C. 908 (1958). Advertising similar to the ad, first published in November, 1957, which is the subject of the order here under review, was not among the acts or practices so prohibited—although three of the authors called by the Commission to support the instant complaint testified they had begun to deal with Exposition Press as a result of similar advertisements published in 1955 or early 1956.

The F. T. C. makes no claim that petitioners have failed meticulously to observe the comprehensive cease and desist order entered as a result of the previous proceeding. Instead, in May, 1959, only fifteen months later, the Commission issued a new complaint. This charged that respondents (now petitioners) "have made many statements and representations, directly or indirectly, concerning the nature and operation of their said business, the sales and payments made therefor to author customers. Among said

statements set out in a variety of ways is that respondents pay their authors a 40% royalty on books published and sold by them," whereas "In truth and in fact, respondents do not pay their authors a 40% royalty or any kind of royalty."

As Chief Judge Lumbard's opinion reveals, these broad charges ultimately simmered down to a single narrow one. Not only the head and front but the whole of petitioners' offending is an advertisement, an inch and a quarter long and two inches and a quarter wide. The brochures there offered as "free" were, in fact, free—the case thus bears no resemblance to *F. T. C.* v. *Standard Education Society*, 302 U. S. 112 (1937), or to *Book-of-the-Month Club, Inc.* v. *F. T. C.*, 202 F. 2d 486 (2 Cir.), cert. dismissed, 346 U. S. 883 (1953). The brochures did tell "how to publish your Book, get 40% royalties" etc. Moreover, and this is essential, they told it in a way that left no slightest doubt that the author must pay Exposition "a subsidy in three installments for the publication of the first edition of his book." Beyond that, Exposition advised him "to seek publication on a non-subsidized basis, if possible," and to turn to Exposition only if that endeavor failed. If Exposition then found the manuscript acceptable "we will submit our terms for your careful consideration." While the hope of financial success was not snuffed out, the brochures recognized "The uppermost question in the mind of an author considering a subsidized publication venture is: 'What will it cost to publish my book?'" Specimen figures showed to anyone endowed with even an elementary knowledge of arithmetic, that, for example, the "subsidy" required to publish an edition of 2500 copies of a 176 page book would exceed the 40% royalties unless some 1800 copies were sold. If the author ever arrived at a contract with Exposition, the "subsidy" he was required to pay

was plainly set out immediately under a paragraph entitled "No Sales Guarantee," reciting "that neither party estimates or guarantees the number of copies of this work which shall be sold, it being recognized that it is impossible to predict such sales."

Although there was no dispute as to any of this, the Commission proceeded to amass a record formidable in size, if not in content. Hearings were held on nine separate days, some in New York City and others in Richmond, Va., where Exposition was not represented by counsel[1] and accumulated a transcript of 1,080 pages and numerous exhibits. The Commission called ten authors who had dealt with Exposition. Six of these had begun their dealings before the advertisement now banned was published; hence their testimony, taken most favorably to the Commission, is not that they were misled by the challenged advertisement but that they thought they would have been if they had seen that and nothing more. Of the four who had answered the ad, only one would have interpreted it as not calling for any payment by him, and none were dissatisfied. The slender evidence supplied by these ten authors was sought to be eked out by the testimony of two "professional publishers" and three professional authors. The role of these eight witnesses is somewhat puzzling; apparently they were giving testimony, as experts, how they would have understood the ad if they had not been.

With the best-known writers receiving royalties of 15% to 20%, an author yet unknown to fame must possess altogether inordinate naiveté to suppose that anyone would pay all the costs of publishing his brainchild and a 40% royalty

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[1] I gather that, due to the financial burden of FTC proceedings, this is not an uncommon development. See e.g., Brief for petitioner in *Ward Laboratories, Inc. v. FTC*, 276 F. 2d 952 (2 Cir. 1960), p. 4.

to boot. Thus I am by no means sure the Commission's basic finding that the ad conveyed a misleading impression of what the free brochures would convey is sustainable, even taking into account Judge Augustus Hand's statement that the Commission may insist "upon a form of advertising clear enough so that, in the words of the prophet Isaiah 'wayfaring men, though fools shall not err therein,'" *General Motors Corp.* v. *F. T. C.*, 114 F. 2d 33, 36 (2 Cir. 1940), and the Commission's admittedly broad power to draw inferences. However, there is no occasion to debate this, for the evidence makes it plain beyond peradventure, and the absence of any contrary findings confirms, that any remote tendency of the ad to mislead was ended when the brochures arrived. Hence the only prejudice possibly suffered even by the most wayfaring and foolish authors would be a 4¢ stamp, the depression when the brochures dissipated the temporary euphoria of thinking their books would be published without cost, and perhaps an occasional decision, taken with all the facts fully disclosed, to move into a flame of publication that otherwise would have stayed unseen.

I cannot believe this came within the area with which Congress was concerned when it created the Federal Trade Commission and empowered it to prevent "unfair methods of competition in commerce" in 1914, 38 Stat. 717, 719, § 5, or even when Congress added "unfair or deceptive acts or practices in commerce" in 1938, 52 Stat. 111, 112. Whether a particular activity offends § 5 remains a question for the courts to decide, *F. T. C.* v. *Gratz*, 253 U. S. 421 (1920). Although the 1914 debates reveal "no clear agreement" on the meaning of § 5, all the speakers were a long way from anything with so ephemeral an effect as

what was proven here, and the 1938 amendment, designed to eliminate the need of proving a potential adverse effect on competition did not eliminate the need of establishing the potentiality of the kind of adverse effect of which the law customarily takes note. Although the Commission is not limited to common law concepts, *F. T. C. v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934), that decision itself indicates the type of showing needed to support a departure from them.

Neither the language nor the history of the statute reveals a purpose to bring the vast power of the Federal Government into play simply to prevent what at most is a slight excess in a blurb, completely rectified before it can have any adverse economic effect on any reader. The *General Motors* case, *supra*, is not a parallel. It dealt with national wide advertising involving a mathematical concept which, though simple to the initiate, may well have lain beyond the ken of the multitude who were committing their funds, even when it was explained in greater detail, as it not always was. So too, *Carter Products, Inc. v. F. T. C.*, 186 F. 2d 821 (7 Cir. 1951), is altogether different, since there the disclosure on the package did not come to the purchaser's attention until he had spent his money. The broad statement in that opinion quoted by my brothers is a dictum going far beyond *F. T. C. v. Standard Education Society, supra*, which was cited to support it; in *Standard Education*, the false statement was repeated in the purchase contract and the defense that was overruled was simply that no one in his senses could really have believed it. *Progress Tailoring Co. v. F. T. C.*, 153 F. 2d 103 (7 Cir. 1946), merely applied the principle of *Standard*

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[2] See Henderson, The Federal Trade Commission (1927), 33-36; Cushman, The Independent Regulatory Commissions (1941), 205-213.

Education, that a seller may not advertise as free what is not in fact free. The injury to Exposition's competitors on which my brothers rely, although "found," was not proved; and at the argument before us counsel for the Commission properly disclaimed any reliance on it. The appendices to the briefs contain almost nothing to show the existence of other "subsidy" publishers and surely nothing to indicate that petitioners' present methods, more ethical than theirs so far as the appendices show, were likely to cause any diversion from them. In contrast, in the second *Raladam* case, 316 U. S. 149 (1942), cited by the majority, there was evidence permitting the Commission to "conclude that numerous antifat remedies were offered for sale in the same market as Marmola" and that unless the misleading representations were stopped, "trade will be diverted from other competitors who do not engage in such 'unfair methods,'" 316 U. S. at 152. I realize that, under the Wheeler-Lea amendment of 1938, it is enough for the Commission to prove an injury to consumers even though there be none to competitors, the first *Raladam* case, 283 U. S. 643 (1931), being thereby overruled to that extent;[3] but if injury to competitors is relied on to bring an order within § 5, there being none to consumers, both *Raladam* decisions demand that such injury be established.

Moreover, the Wheeler-Lea amendment left unimpaired the provision in § 5(b), 15 U. S. C. § 45(b), limiting the Commission's jurisdiction to cases where "it shall appear to the Commission that a proceeding • • • would be to the interest of the public." In *F. T. C. v. Klesner*, 280 U. S.

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[3] *Koch v. FTC*, 206 F. 2d 311, 319 (6 Cir. 1953). See Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law and Contemporary Problems 91, 96 (1939); Note, The Consumer and Federal Regulation of Advertising, 53 Harv. L. Rev. 828, 834-837 (1940).

In 1920 (1928) the Supreme Court held that although the Commission's preliminary determination that institution of a proceeding is in the public interest "will ordinarily be accepted by the courts" such action "is subject to judicial review": that if it appears at any time that the proceeding is not in the public interest, the Commission ought dismiss the complaint; and that if the Commission nevertheless enters an order, "the court should, without inquiry into the merits, dismiss the suit."[4]

It is doubly significant that the *Klesner* opinion was written by Mr. Justice Brandeis. For "he, more than any other man, was the begetter" of the Federal Trade Commission.[5] Two years before that opinion, Henderson had published his critical study of the Commission, suggesting, among other things, that "it should exercise a greater discretion in selecting those cases which involve questions of public importance" and querying, as to the *Klesner* proceeding, 5 F. T. C. 24 (1922), "what there was in the case to call for the intervention of a federal administrative tribunal."[6] It is hardly accidental that Mr. Justice Brandeis placed the Supreme Court's decision in *Klesner* on the ground that he did, rather than simply affirming the Court of Appeals, 25 F. 2d 324 (D. C. Cir. 1928), on the merits. His opinion was a summons to the Commission to do what it had been created to do to get on with "the great purpose of the act," as Mr. Justice Sutherland, also not without direct knowledge of the Act's origins, was later to say in an opinion in which Brandeis joined. *F. T. C. v. Raladam*

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[4] The *Klesner* decision has been cited with approval as recently as *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U. S. 79, 83 (1956), and *Klor's v. Broadway-Hale Stores, Inc.*, 359 U. S. 207, 211-212, fn. 4 (1959), the latter distinguishing the contracting rule under § 1 of the Sherman Act.

[5] See Mason, Brandeis: A Free Man's Life (1956), p. 462.

[6] Henderson, *op. cit. supra* note 2, pp. 337, 171.

Co., 283 U. S. at 650." True, as my brothers point out, *Klesner* involved a private controversy as the instant case does not; but the basis of the *Klesner* decision was not the presence of a private interest but the absence of a public one. In *Moretrench Corporation* v. *F. T. C.*, 127 F. 2d 792, 795 (2 Cir. 1942), Judge Learned Hand, reviewing *Klesner* in the light of subsequent decisions, said that it "is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission." See also *S. Buchsbaum & Co.* v. *F. T. C.*, 160 F. 2d 121, 123 (7 Cir. 1947). To me this second round against petitioners, brought to correct what at worst is a trifling lack of candor, passed over in the first one, and having a merely temporary and non-pecuniary effect on a handful of people presumably of some sophistication, precisely fits Judge Hand's test: the government funds that have been spent on this proceeding, not to speak of the diversion of energies from more worth-while tasks, outrun any possible public benefit by a tremendous margin."

I would grant the petition to review and annul the order.

APPENDIX B

Decree of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 26,840

EXPOSITION PRESS, INC., and EDWARD UHLAN,

Petitioners,

—v—

FEDERAL TRADE COMMISSION

Respondent.

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Exposition Press, Inc., a corporation, and Edward Uhlan, petitioners, having filed in this Court on the 3rd day of March, 1961, a petition for review of and to set aside or modify an order to cease and desist issued against Exposition Press, Inc., a corporation, and Edward Uhlan, on the 22nd day of December, 1960, by the Federal Trade Commission, respondent, in a proceeding before it entitled "In the Matter of Exposition Press, Inc., a corporation, and Edward Uhlan, Docket Number 7489"; and a copy of said petition having been served upon the Commission; and the Commission having thereafter certified and filed in this Court, as required by the Federal Trade Commission Act, a transcript of the entire record in the proceeding which resulted in the said order to cease and desist; and the matter having been heard by this Court on briefs and oral argument and this Court having thereafter rendered its decision on the 6th day of November, 1961, affirming the order to cease and desist issued on the 22nd day of Decem-

ber, 1960, as aforesaid, and directing that the said order be enforced;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside or modify the order of the Federal Trade Commission be, and it hereby is, denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said order to cease and desist be, and it hereby is affirmed, and that petitioners Exposition Press, Inc., a corporation, and Edward Uhlan, be and they hereby are, commanded forthwith to obey and comply with the terms thereof;

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days (60) days after the entry of this decree Exposition Press, Inc., a corporation, and Edward Uhlan, shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with the said order to cease and desist;

Without prejudice to the right of the United States, as provided in Section 5(l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the said order to cease and desist, hereby affirmed and enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

J. EDWARD LUMBARD,
J. JOSEPH SMITH,
United States Circuit Judges.

Dated: November 28, 1961.

A true copy:

A. DANIEL FUSARO,
Clerk